CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Judith Kurtz of Equal Rights Advocates concerning the Department of Fair Employment and Housing's Field Operations Directive No. 17 (regarding complaints filed on the basis of pregnancy discrimination)[1]	1989 OAL Determination No. 15 [Docket No. 89-002] October 10, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a directive issued by the Department of Fair Employment and Housing, which provides procedures for the handling of complaints alleging discrimination on the basis of pregnancy, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

We find that those portions of the directive which provide for the waiver of complaints alleging pregnancy discrimination to the Equal Employment Opportunity Commission, fall within the definition of a "regulation," requiring adoption in compliance with the Administrative Procedure Act. The remaining portions of the challenged directive do not meet the definition of a "regulation."

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether the Department of Fair Employment and Housing's Field Operations Directive No. 17 concerning discrimination on the basis of pregnancy is (1) subject to the requirements of the Administrative Procedure Act ("APA"), (2) a "regulation" as defined in Government Code section 11342, subdivision (b), and therefore (3) violates Government Code section 11347.5, subdivision (a).[4]

THE DECISION [5,6,7,8]

The Office of Administrative Law finds that the provisions of Field Operations Directive No. 17 which provide for the waiver of complaints alleging discrimination on the basis of pregnancy to the Equal Employment Opportunity Commission (the first sentence of Provision 3, all of Provision 4, and subdivisions (C) and (D) of Provision 5) are subject to the requirements of the APA[9], are "regulations" as defined in the APA, and therefore violate Government Code section 11347.5, subdivision (a). The remaining provisions of Field Operations Directive No. 17 (Provision 1, Provision 2, the second sentence of Provision 3, and subdivisions (A) and (B) of Provision 5) are not "regulations" as defined in the APA and are not subject to the requirements of the APA.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The California Fair Employment Practices Act was adopted in 1959.[10] The declared public policy of this legislation was to protect the rights of all persons to seek, obtain, and hold employment without discrimination on account of race, religion, creed, color, national origin, or ancestry.[11] In 1970, the Legislature amended the Act to include discrimination based upon sex.[12] In 1980, the Legislature replaced this legislation with the California Fair Employment and Housing Act ("FEHA").[13] This latter act established the present Department of Fair Employment and Housing ("Department") and the Fair Employment and Housing Commission ("Commission").[14] Generally, the Department is the state agency charged with enforcing the FEHA,[15] while the Commission is the state agency authorized to interpret it.[16]

Among other functions, powers and duties entrusted by the Legislature, the Department is authorized

> "To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the functions and duties of the department pursuant to this part."[17] [Emphasis added.]

> "To receive, investigate and conciliate complaints alleging practices made unlawful pursuant to Chapter 6 (commencing with Section 12940)."[18]

The Commission has also been delegated a number of functions, powers and duties, including

> "To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part, (2) to regulate the conduct of hearings..."[19] [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA generally applies to all state agencies, except those "in the judicial or legislative departments."[20] Since the Department is in neither the judicial nor the legislative branch of state government, the APA rulemaking requirements generally apply to the Department.[21]

Background

To facilitate better understanding of this determination, we set forth the following undisputed facts and relevant statutes, regulations and case law.

The California Fair Employment Practices Act was adopted in 1959[22] with the express purpose of protecting the right of all persons from discrimination in employment on account of race, religion, creed, color, national origin, or ancestry.[23] Thereafter the United States Congress adopted the Civil Rights Act of 1964 which included "sex" as a protected class within its Title VII.[24] In 1970, the Legislature amended the California Fair Employment Practices Act to include discrimination based upon sex.[25] Discrimination based upon "pregnancy" was not mentioned in either act.

On April 5, 1972, Part 1604, entitled "Guidelines on Discrimination Because of Sex," was added to Title 29 of the Code of Federal Regulations.[26] Within these guidelines, employment policies or practices that negatively impact on women because of pregnancy, childbirth and related medical conditions were prohibited as discrimination based upon sex.[27] On November 7, 1974, the Fair Employment Practices Commission similarly issued guidelines which prohibited pregnancy discrimination as sex discrimination.[28] However, in 1976, the United States Supreme Court in General Electric Co. v. Gilbert[29] held that excluding from disability plan coverage, periods of disability arising from or related to pregnancy, did not constitute sex discrimination under Title VII, absent an indication that the exclusion was a pretext for discriminating against women.

In 1978, the California Legislature enacted section 1420.35 of the Labor Code (now Gov. Code, sec. 12945) which contained specific provisions designed to prohibit pregnancy discrimination.[30] In the same year, the United States Congress, in response to the position taken by the United States Supreme Court, enacted the Pregnancy Discrimination Act as section 701(k) of Title VII.[31] This act specifically included pregnancy, childbirth, and related medical conditions within the prohibition against sex discrimination.[32] In 1979, the California Legislature passed AB 121, which amended section 1420.35 of the Labor Code (now Gov. Code, sec. 12945), in response to the changes made in Title VII.[33]

On January 18, 1982, the Department issued Field Operations Directive No. 17, which provided, in part, that:

"All complaints alleging pregnancy discrimination EXCEPT for those listed below are to be waived to EEOC for processing:

A. Complaints where respondent has less than 15 employees; or

B. Complaints alleging denial of a four-month pregnancy leave." [Emphasis in original.]

In 1983, the United States Supreme Court in Newport News Shipbuilding & Dry Dock Co. v. EEOC[34] recognized that, after the amendments made to Title VII by the Pregnancy Discrimination Act, discrimination based on pregnancy is prohibited as sex discrimination under Title VII. Also in 1983, the Department and Commission were sued by California Federal Savings and Loan Association (CalFed) in Federal District Court to enjoin them from pursuing a complaint alleging violation of section 12945, subdivision (b)(2), of the Government Code by refusing to reinstate complainant upon returning to work after a three-month disability leave. In 1984 the U.S. District Court issued an injunction, but the decision was overturned in 1985 by the United States Court of Appeal, Ninth Circuit.[35]

In 1986, the Commission adopted regulations concerning pregnancy discrimination, which were disapproved by the Office of Administrative Law (OAL) and returned to the agency.[36]

In 1987, the United States Supreme Court in California Federal Savings and Loan Assn. v. Guerra[37] concurred with the Ninth Circuit and upheld the leave provisions in section 12945, subdivision (b)(2), of the Government Code. Also in 1987, the Commission resubmitted amended regulations to OAL concerning pregnancy discrimination.[38] These regulations, which were approved and filed with the Secretary of State as section 7291.2 of Title 2 of the California Code of Regulations, contained provisions which apply to Title VII employers, as well as non-Title VII employers.

On January 5, 1989, the Department submitted a motion to the Commission requesting the repeal of section 7291.2 of Title 2 of the California Code of Regulations.

On January 26, 1989, Judith Kurtz of Equal Rights Advocates filed a request with OAL for a determination as to whether the Department's Field Operations Directive No. 17 (the "challenged rule") is an "underground" regulation.

II. DISPOSITIVE ISSUES

There are two main issues before us:[39]

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

The procedure which was the focus of this Request for Determination is contained in Provision 4 of Field Operations Directive No. 17 ("Directive 17"). Provision 4, entitled "Guidelines," provides that all complaints alleging pregnancy discrimination are to be waived to the Equal Employment Opportunity Commission ("EEOC") except where (1) the respondent has less than 15 employees or (2) the complaint alleges denial of a four-month pregnancy leave. The other waiver provisions contained in Directive 17 include the first sentence of Provision 3 and subdivisions (C) and (D) of Provision 5. The first sentence of Provision 3 sets the groundwork for Provision 4 by stating that AB 1960 excludes employers subject to Title VII from state jurisdiction. Subdivision (C) of Provision 5 precludes state involvement on complaints to be waived to the EEOC. Subdivision (D) of Provision 5 specifies when complaints alleging discrimination on one or more grounds in addition to pregnancy will be waived.

In its Response to this Request for Determination, the Department states that Directive 17 merely advises district office staff of the internal forms to complete and case closure categories to employ in a pregnancy case involving an employer subject to Title VII, i.e., employers of 15 or more persons. However, whether or not an agency action is regulatory in nature hinges on the effect and impact on the public rather than the agency's characterization. In this case, the directive to agency staff effectively barred all those filing complaints with the Department alleging employment discrimination based upon pregnancy from obtaining recourse at the state level, unless the respondent (1) employed less than 15 employees or (2) the complaint alleged denial of short-term pregnancy leave.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[40] It is apparent from the language used in Directive 17 that the waiver provisions applied to complaints from all persons similarly situated and thus are standards of general application.

The answer to the second part of the inquiry,--i.e., does Directive 17 establish rules which implement, interpret or make specific the law enforced or administered by the Department or govern its procedure--, is also "yes" (except for certain provisions which are nonregulatory.)[41]

In its response to the Request for Determination, the Department asserts that Directive 17 fails as a "regulation" because it does not implement, interpret, or make specific the law and is more aptly described as information concerning existing law. The Department argues that Directive 17 merely states what subdivision (e) of Government Code section 12945 requires.

In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and "its application." Such an enactment is simply "administrative" in nature, rather than "quasi-judicial" or "quasi-legislative." If, however, the agency makes new law, i.e., supplements or "interprets" a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power.

Fundamental to the issue of whether or not provisions contained in Directive 17 supplement or interpret the law enforced or administered by the agency, is whether or not the law involved needs such supplementation or interpretation. In a previous Determination we stated:

> "If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable 'interpretation,' that rule is not quasi-legislative in nature--no new 'law' is created."[42] [Emphasis added.]

Therefore, if the requirements in law relevant to Directive 17 can reasonably be read only one way, then those same requirements, if included in Directive 17, are no more than restatements of the law. For this reason, the state of the law must be examined.

Section 12940 of the Government Code (formerly Labor Code section 1420) prohibits discrimination in the workplace on a number of grounds, one of which is "sex."

> "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
>
> (a) For an employer, because of the race, religious creed, color, national origin,

> ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or fom a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment. . ." [Emphasis added.]

Section 12945 of the Government Code (formerly Labor Code section 1420.35) specifically prohibits discrimination in the workplace on the basis of "pregnancy."

> "It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:
>
> (a) For any employer, because of the pregnancy, childbirth, or related medical condition of any female employee, to refuse to promote her, or to refuse to select her for a training program leading to promotion, provided she is able to complete the training program at least three months prior to the anticipated date of departure for her pregnancy leave, or to discharge her from employment or from a training program leading to promotion, or to discriminate against her in compensation or in terms, conditions, or privileges of employment.
>
> (b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either:
>
> > (1) To receive the same benefits or privileges of employment granted by that employer to other persons not so affected who are similar in their ability or inability to work, including to take disability or sick leave or any other accrued leave which is made available by the employer to temporarily disabled employees. For purposes of this section, pregnancy, childbirth, and related medical conditions are treated as any other temporary disability. However, no employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth, or related medical condition for a period exceeding six weeks. Nothing in this section shall be construed to require an employer to provide

his or her employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions. The inclusion in any such health insurance coverage of any provisions or coverage relating to the medical costs of pregnancy, childbirth, or related medical conditions shall not be construed to require the inclusion of any other provisions or coverage, nor shall coverage of any related medical conditions be required by virtue of coverage of any medical costs of pregnancy, childbirth, or other related medical conditions.

(2) To take leave on account of pregnancy for a reasonable period of time; provided, such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. Nothing herein shall be construed to limit the provisions of paragraph (1) of subdivision (b).

An employer may require any employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date such leave shall commence and the estimated duration of such leave.

(c) (1) For an employer who has a policy, practice, or collective-bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(2) For any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated, provided, however, that no employer shall be required by this section to create additional employment which the employer would not otherwise have created, nor shall such employer be required

to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

(d) This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy.

(e) The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964."

[Emphasis added.]

Directive 17 provides:

"1. SUBJECT: COMPLAINTS FILED ON THE BASIS OF PREGNANCY DISCRIMINATION.

2. PURPOSE: To provide procedures for handling complaints alleging discrimination on the basis of pregnancy.

3. BACKGROUND: AB1960, which became effective January 1, 1979, excludes from State jurisdiction (in most cases) all employers who fall under the jurisdiction of EEOC (Title VII of the Federal Civil Rights Act of 1964). Because of this, it is necessary to provide Department staff with guidelines to clarify which charges are to be waived to EEOC and which charges can be properly be processed by DFEH.

4. GUIDELINES: All complaints alleging pregnancy discrimination EXCEPT for those listed below are to be waived to EEOC. . . for processing:

   A. Complaints where respondent has less than 15 employees; or

   B. Complaints alleging denial of a four-month pregnancy leave. . .

5. PROCEDURE:

   A. Pregnancy discrimination complaints that are to be processed by DFEH are to be handled in the usual manner for DFEH complaints.

B. Pregnancy discrimination complaints that are to be processed by EEOC are to be handled as follows:

1) After the complaint is taken, EEOC form 212-A is to be completed and section marked "706 Agency Waives" is to be checked.

2) The 212-A is to be sent to EEOC with copies of the complaint, the pre-complaint questionnaire, and any interview notes.

3) A pre-closure letter, DFEH-200-09, is to be sent to the complainant.

4) The complaint is to be closed immediately on the basis of code 11, "processing waived to another agency."

C. Complaints being waived to EEOC for processing are not to be investigated, nor is there to be any negotiation with respondent. If a respondent indicates to DFEH that the complaint may be settled, DFEH staff should refer that respondent to the appropriate EEOC office.

D. Complaints alleging discrimination on another basis (e.g., race) in addition to pregnancy.

1) If the basis is one over which EEOC has jurisdiction, there is no need to split the complaint. The entire complaint is to be waived.

2) If the other basis is not within the jurisdiction of EEOC, or if the fact situation is different, a separate complaint is to be drafted and processed by DFEH."

The Department in its Response to the Request for Determination states that:

> "By Directive, the Department may legally inform interested parties of the statute (Government Code section 12945(e)) and 'its application' as long as the Directive does not add to, interpret, or modify the statute. (1988 OAL Determination No. 15, supra. at p. 9). Directive 17, on its face, does not add to, interpret, or modify Government

> Code Section 12945(e). It merely states what the law requires -- that all cases involving employers subject to Title VII (fifteen or more employees), except those alleging denial of a four month pregnancy leave, must be waived to EEOC for processing. There is no language which implements, interprets, or makes Government Code section 12945(e) specific.
>
> "At the time Directive 17 was issued (January 18, 1982), the underlying statutory law had been in effect for two years. Directive 17 was merely an internal management directive advising district office staff of the internal forms to complete and case closure categories to employ in a pregnancy case involving a Title VII employer.
>
> "The underlying statute, Government Code section 12945(e), does not require implementation, but rather is jurisdictional. Title VII employers, except for complaints alleging denial of leave for pregnancy, cannot be prosecuted as of January 1, 1979. It is incongruous, ten years after the law's effective date, to invalidate a Directive as inconsistent with a Commission regulation promulgated eight years later in 1987!"[43]

The Department argues that section 12945 of the Government Code is the only section of the Fair Employment and Housing Act which deals specifically with pregnancy discrimination and that the "plain meaning" of subdivision (e) of this section is to deprive ". . .the Department of any authority or jurisdiction over pregnancy related complaints against Title VII employers, except complaints relating to failure to grant pregnancy leave."[44]

Subdivision (e) of Government Code section 12945 provides:

> "The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the Federal Civil Rights Act of 1964."

The Department states that it was the clear intention of the Legislature in enacting Government Code section 12945 to exempt Title VII employers (employers with 15 or more employees) from all but the provision in subdivision (b)(2) regarding pregnancy leave.[45] The Department cites language from a letter written by the author of Government Code section 12945.[46] In this letter, dated February 9, 1979, to Lewis Keller, Executive Vice President of the Association of California Life Insurance Companies, then Assemblyman Howard Berman, the author of AB 1960 which enacted Labor Code

section 1420.35 (now Government Code section 12945) and AB 121 which added subdivision (e), states:

> "Lastly, AB 121 clarifies the language of Labor Code Section 1420.35 as added by AB 1960. As stated above, that section of the Labor Code is not applicable to those employers subject to federal law affecting pregnancy discrimination [sic] became effective October 31, 1978 with an allowance of 180 days for employers to comply with respect to fringe benefit programs. As a result, the large employers (over 15) were actually 'pre-empted' from compliance with AB 1960 and the clean-up bill, AB 121, before the effective dates of either bill -- with the one (unpaid leave) exception. The retroactivity of AB 121 has no impact on large employers with respect to employer disability benefits, sick leave or health insurance programs. Large employers must comply only with the federal law in the area of fringe benefits."

The Department argues that the rules of statutory construction also support the language in Directive 17 as being the only legally tenable interpretation of subdivision (e) of Government Code section 12945.[47] The Department states that:

> "A specific provision relating to a particular subject will govern in respect to that subject-in this case pregnancy discrimination-as against a general provision, although the latter standing alone would be broad enough to include the subject to which the more particular provision relates."

The Department also refers to the rule that an interpretation of a statute that renders a related statutory provision a nullity must be avoided.

> "The general cause for 'sex discrimination' does not subsume the more specific cause of pregnancy discrimination where a Title VII employer is the respondent. Title VII employers are statutorily exempted from portions of the Act's coverage, which specifically recognizes that the federal Pregnancy Discrimination Act (PDA) preempts California law. In other words, the FEHA can be reasonably read to both prohibit pregnancy discrimination under sections 12940 and 12945 and to exempt Title VII employers from parts of its coverage.
>
> "Statutes should not be interpreted to reach absurd results. If section 12940 is read to cover

> Title VII employers for all manner of pregnancy discrimination, then Title VII employers would be exempted from absolutely nothing under section 12945(e). The Commission's interpretation of section 12940 in its regulations renders section 12945(e) completely nugatory and implies legislative futility in the passage of section 12945(e).
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> "The United States Supreme Court examined this question and noted:
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> > 'Indeed, Congress and the California Legislature were each aware in general terms of the regulatory scheme adopted by the other when they enacted their legislation. California recognized that many of its provisions would be pre-empted by the PDA and, accordingly, exempted employers covered by Title VII from all portions of the statute except those guaranteeing unpaid leave and reinstatement to pregnancy workers.' California Federal Savings and Loan Association v. Guerra '"[48]

As will be discussed below, the Department's position is not the only interpretation of the state of the law in this area of which OAL is aware. The Fair Employment and Housing Commission (Commission) has interpreted section 12945 of the Government Code quite differently from the Department. The Commission has found that the limitation contained in subdivision (e) of section 12945 applies only to the provisions in that section but that the state retains jurisdiction over pregnancy discrimination through the prohibition against sex discrimination in Government Code section 12940.

In contrast to the role of the courts, it is not OAL's function here to decide which of the two interpretations is the more correct. OAL's function is much more limited. Our role is merely to determine whether provisions contained in Directive 17 represent the only legally tenable interpretation of the California Fair Employment and Housing Act ("FEHA"). Although the Department's rationale for the waiver provisions in Directive 17 is well-supported, we conclude that it is not the only legally tenable interpretation of Government Code 12945.

Before detailing the Commission's interpretations of Government Code section 12945, OAL is compelled to discuss the footnote cited as controlling by the Department from the United States Supreme Court decision in California Federal Savings and Loan Association v. Guerra.[49] OAL notes that

the Department appears to present the above-quoted footnote as a judicial pronouncement by the United States Supreme Court that California law, by its own terms, exempts Title VII employers from state coverage for pregnancy discrimination (except for the guarantee of unpaid leave and reinstatement under subdivision (b)(2) of Government Code section 12940). OAL is not so certain as to the nature of the footnote and what effect it might have.

Generally, the doctrine of stare decisis applies only to points that are involved and determined in a case in such a way as to be considered of compelling force as precedents in subsequent cases.[50] Incidental statements or conclusions not necessary to the discussion are not to be regarded as authority.[51]

> "Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum. [citing cases.] The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of stare decisis to be followed [citing cases], no matter how often repeated. [citing cases] Expression of dictum is not binding on a court inferior to that which rendered the decision. [citing cases][52]

With this in mind, we turn to the case which contained the footnote cited by the Department. In California Federal Savings and Loan Association v. Guerra, the United States Supreme Court had occasion to examine section 12945 of the Government Code. The Court describes the facts as follows:

> "The California Fair Employment and Housing Act in section 12945(b)(2) requires employers to provide leave and reinstatement to employees disabled by pregnancy. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, as amended by the Pregnancy Discrimination Act (PDA), specifies that sex discrimination includes discrimination on the basis of pregnancy. A woman employed as a receptionist by petitioner California Federal Savings & Loan Association (Cal Fed) took a pregnancy disability leave in 1982, but when she notified Cal Fed that she was able to return to work she was informed that her job had been filled and that there were no similar positions available. She then filed a complaint with respondent Department of Fair Employment and Housing, which charged Cal Fed with violating section 12945(b)(2). Before a hearing was held on the complaint, Cal Fed, joined by the other

> petitioners, brought an action in Federal District Court, seeking a declaration that section 12945(b)(2) is inconsistent with and pre-empted by Title VII and an injunction against its enforcement. The District Court granted summary judgment for petitioners, but the Court of Appeals reversed."

Subdivision (b)(2) of Government Code section 12945 is the provision guaranteeing unpaid leave and reinstatement to pregnant workers which was specifically made applicable to Title VII workers under subsection (e) of Government Code section 12945. Again, subsection (e) provides:

> "The provisions of this section, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964." [Emphasis added.]

The Supreme Court found that subdivision (b)(2) of Government Code section 12945 was not preempted by federal law and affirmed the ruling of the Ninth Circuit Court of Appeals. In so doing, the Court did not find that any other provision of state law concerning pregnancy discrimination was pre-empted. In fact, the Court pointed out that the intent of Title VII of the federal Civil Rights Act was to severely limit any preemptive effect on state fair employment laws.

> "Sections 708 and 1104 severely limit Title VII's preemptive effect. Instead of pre-empting state fair employment laws, section 708 simply left them where they were before the enactment of Title VII."[53]

Section 708 of Title VII provides:

> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."[54]

Section 1104 of Title XI, which is applicable to all titles of the Civil Rights Act, provides:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of States laws on the same subject matter, nor shall any provision

> of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."[55]

With this backdrop, we now examine the footnote cited by the Department from this decision.

> "Indeed, Congress and the California Legislature were each aware in general terms of the regulatory scheme adopted by the other when they enacted their legislation. California recognized that many of its provisions would be pre-empted by the PDA and, accordingly, exempted employers covered by Title VII from all portions of the statute except those guaranteeing unpaid leave and reinstatement to pregnancy workers."

It does not appear that the information relayed by this footnote was in any way necessary to the decision reached by the Court. OAL is aware that where a pronouncement of the United States Supreme Court is involved, even dictum is entitled to some persuasive influence.[56] However, based upon the record before OAL, it would not appear that this footnote disposed of an issue considered by the Court. Moreover, OAL cannot ignore the extensive discussion in the text of the decision itself in which the Court has emphasized the intent of Congress to avoid preempting state legislation aimed at preventing pregnancy discrimination unless the state legislation is inconsistent with or does not meet the minimum level of protection afforded by the Pregnancy Discrimination Act.

The Court found that:

> "The narrow scope of preemption available under 708 and 1104 reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity. . ."[57]

and that:

> ". . .Congress intended the PDA to be a 'floor beneath which pregnancy disability benefits may not drop -- not a ceiling above which they may not rise.'"[58]

Accordingly, OAL is not convinced that the footnote cited by the Department is intended as a judicial pronouncement on the scope of California law on pregnancy discrimination. Instead, this footnote appears to be provided by the Court as background information and without any intent that it have precedential effect.

We now look to the Commission's interpretation of Government Code sections 12940 and 12945. We note that the Commission is specifically empowered by the Legislature to interpret the Fair Employment and Housing Act. Subdivision (a) of Government Code section 12935 authorizes the Commission to:

> ". . .adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part. . ."

The Commission has interpreted Government Code section 12940 and 12945 in the current version of section 7291.2 of Title 2 of the California Code of Regulations.[59] This regulation was promulgated and adopted pursuant to the rulemaking procedures required by the Administrative Procedure Act. Section 7291.2 includes specific provisions designed to prevent pregnancy discrimination which apply to Title VII employers, as well as non-Title VII employers. Subsection (d) of section 7291.2 of Title 2 of the California Code of Regulations provides in part that "Discrimination because of pregnancy, childbirth or related medial conditions constitutes sex discrimination under Government Code section 12940." Subsection (d) goes on to provide specific prohibitions against pregnancy discrimination by both non-Title VII and Title VII employers. This interpretation of the FEHA is of course contrary to the provisions in Directive 17 which mandate an automatic waiver to the EEOC when pregnancy discrimination is alleged against Title VII employers (unless subdivision (b)(2) leave is involved).

In support of its interpretation of the Act, the Commission relies upon the same grounds utilized by the Department, i.e., the plain meaning of Government Code section 12945, the intent of the Legislature, and the rules of statutory construction.[60]

The Commission argues that the ". . .clear and unambiguous meaning of the words of subdivisions (d) and (e) of section 12945 is that nothing in that section was intended to affect the treatment of pregnancy discrimination as a form of sex discrimination under section 12940." Subdivision (e) of Government Code section 12945 provides:

> "The provisions of <u>this section</u>, except paragraph (2) of subdivision (b), shall be inapplicable to any employer subject to Title VII of the federal Civil Rights Act of 1964." [Emphasis added.]

The Commission points out that the Legislature used the words "this section" rather than "this part" in subdivision (e) of section 12945.

"This subdivision is very clear. The subdivision exempting Title VII employers quite plainly applies only to section 12945. There is no reference of any kind to section 12940. As the discussion of legislative history details more fully below, the Legislature is quite capable of making a specific reference to the rest of the FEH Act--by using 'this part'--when it wants to. By its plain meaning, therefore, subdivision (e) had no effect on section 12940.

"In addition, the plain meaning of subdivision (d) of section 12945 is that not just subdivision (e), but nothing in section 12945 was intended to have any effect on section 12940. Subdivision (d) states:

> 'This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy.'

"The term 'any other provision' means just that--any provision inside or outside of the FEHA, and a 'law relating to sex discrimination' quite obviously covers section 12940's prohibition of sex discrimination. There are surely other laws that fit this description, but it is impossible to read it to exclude section 12940." [Emphasis in original.]

The Commission also argues that the legislative history is clear that Government Code section 12945 was not intended to eliminate the coverage of pregnancy discrimination under Government Code section 12940. The Commission states that:

"On September 28, 1978, the California legislature passed and the Governor signed Assembly Bill 1960 which added Labor Code section 1420.35, now Government Code section 12945. The bill was sponsored by then-Assemblyman and Majority Leader Howard Berman. The bill provided more specific provisions about pregnancy than the general sex discrimination provisions of Labor Code section 1420 (now Gov. Code 12940(a)). In its original form, the bill followed the current language of section 12945 without subdivision (e). After a conference committee on the last day of the legislative session, a 'section 4' was added, which provided:

> 'In the event Congress enacts legislation amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy, the provisions of this

> act, except paragraph (2) of subdivision (b) of Section 1420.35 of the Labor Code, shall be inapplicable to any employer subject to such federal law, except that this section shall not pertain to complaints filed prior to the effective date of this act. (Emphasis added.)'

"Section 4 was not codified but was added to the end of the bill.

"The effect of the Section 4 'override' was to eliminate any regulation of pregnancy discrimination for Title VII employers from Labor Code section 1420.35, except the special requirement of four months leave. The main goal of the bill's proponents, this leave requirement, was thus kept for Title VII employers. With that exception, Labor Code section 1420.35's explicit regulation of pregnancy discrimination, including its six-week lid on certain kinds of leave, and its excuse from provision of health insurance, now applied only to small employers. For Title VII employers, the effect was to go back to square one and subject them to the same basic 'equal treatment' rules inherent in the sex discrimination provisions of both Title VII and the FEHA.

"On October 31, 1978, Congress overruled the United States Supreme Court's widely criticized decision in Gilbert v. General Electric, supra, 429 U.S. 125, which had held that exclusion of pregnancy coverage from a comprehensive benefits package is not in itself discrimination because of sex. Congress amended Title VII to include a new section 701(k), (the Pregnancy Discrimination Act [PDA]), which provided, inter alia, 'the terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions. . ."

"Shortly thereafter, on December 19, 1978, Assemblyman Howard Berman introduced further legislation, AB 121, to correct problems inherent in the 'override.' Berman issued a summary and section-by-section explanation of AB 1960 and an explanation for the AB 121 'clean-up' bill . . . The summary explains that:

> 'It was the intent of AB 1960 to expand protections and benefits to all workers affected by pregnancy, yet not set a limit on

> what constitutes pregnancy discrimination as contained in FEPC sex discrimination regulations. (Emphasis added.)'

"Berman noted that Section 4 of AB 1960 was added at the last minute and did not clearly reflect legislative intent to merely limit the provisions of AB 1960, rather than the entire Act. Berman also took care to note that:

> 'With the new Congressional clarification of "sex discrimination" as it impacts on the employment policies of [Title VII] employers, the State FEPC will not only be revising guidelines on pregnancy discrimination with respect to AB 1960, but also may issue regulations reiterating the FEPC's previous stand on, and reflecting the recent Congressional clarification of, the prohibition against sex discrimination based on pregnancy. (Emphasis added.)'

"AB 121 changed the word 'act' for 'section' in the original override language to make inapplicable to Title VII employers only the provisions of section 1420.35 itself and removed any lingering doubts about the applicability of the override to the Act's general sex discrimination provisions.

"Howard Berman, now a House of Representatives member from Los Angeles, reiterated this position to State Senator Nicholas C. Petris on April 4, 1989 in a letter clarifying the legislative intent of AB 1960 and AB 121. The letter stated that, 'Nothing in Government Code Section 12945 was meant to diminish coverage of pregnancy through the general sex discrimination prohibitions of Section 12940(a)'. . .

"Thus, the clear intent of this change was that the override was clearly not meant to apply to section 1420, now Government Code section 12940. Since 1980, then, all employers should have been subject to whatever pregnancy coverage inheres in section 12940. Whatever doubt on that score was produced by Gilbert was laid to rest in the Supreme Court's retraction of the Gilbert holding in Newport News Shipbuilding & Dry Dock Co. v. EEOC (1983) 462 U.S. 660, which held that pregnancy discrimination was a form of sex discrimination. Thus, Assemblyman Berman's analysis of the legislation that

became section 12945 states unequivocally that the legislation was intended to go beyond section 12940 and not set any limit on its coverage of pregnancy discrimination." [Emphasis in original.]

The Commission also relies upon the rules of statutory construction to support its interpretation of the Act.

"Before a more 'specific' statute such as section 12945 can govern a more 'general' statute such as section 12940(a), there must be a conflict between the specific and general statute; the specific statute does not control--and thus preempt the general provision--merely because it is specific. Instead, all the cases make clear that "repeal" and/or preemption of the general provision by the specific 'are not favored,' and are to be found:

> 'only where there is no rational basis for harmonizing the two potentially conflicting statutes . . . and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."' (People v. Encerti (1982) 130 Cal.App.3d 791, 796.)

"Furthermore, the Supreme Court held in Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d 1379 that:

> '[t]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d 1379, 1387.)'

"At the most fundamental level, there is no need even to resort to these rules of construction here, since there is no conflict between section 12945 and 12940. To be in conflict with a general provision, a specific provision must actually regulate the subject that both provisions cover; the specific provision must actually state rules for conduct pertaining to that subject that conflict with the rules in the more general provision.

"But there are no such rules in section 12945. Outside of the rule requiring a four-month leave, section 12945 simply does not regulate the subject

> of pregnancy coverage of section 12940 within the meaning of the 'specific-over-general' rules of statutory construction.
>
> "There is also no 'conflict' here just because section 12945(e) removes Title VII employers from most of section 12945. This is not somehow contrary to the coverage of such employers' pregnancy practices under section 12940. Section 12940 coverage of Title VII employers would not render section 12945(e) a 'nullity.' This purported 'conflict' is an illusion.
>
> "Obviously, if the Legislature had intended to defeat the Commission's longstanding interpretation of section 12940 and remove all pregnancy coverage from it, the Legislature could easily have found highly specific words to do so. Instead, it explicitly limited the restriction stated in section 12945(e) to section 12945, and took the additional step of stating explicitly that other sex discrimination provisions were <u>not</u> to be affected by anything in section 12945. The function of adding subdivision (e) of section 12945 was, simply, to remove Title VII employers from the potentially inconsistent provisions of section 12945 of the FEH Act--nothing more and nothing less." [Emphasis in original.]

The Commission also states that:

> ". . .a restrictive interpretation of the Act which ignores section 12940(a) coverage of pregnancy discrimination ignores also the Act's mandate to 'liberally construe' the Act to accomplish the purposes of the Act including eradicating sex discrimination."

OAL finds the Commission's argument in support of its interpretation of the FEHA not to be without merit. A statute should be construed with a view toward promoting rather than defeating its general purpose and the policy behind it.[61] Letters submitted to OAL during the comment period for this determination assert that the waiver of complaints to the EEOC pursuant to Directive 17 adversely affects the rights of women in California.[62] Uncontroverted statements in the record chronicle a twelve to fifteen month delay before complaints are assigned an investigator at the EEOC and that complaints addressed by the FEHA are assigned an investigator immediately upon intake and the investigation is typically completed within six months.[63] OAL also notes that:

> "Statutes which are enacted to relieve personal disadvantage, hardship, and suffering are generally accorded general judicial acceptance and liberal construction."[64]

OAL cannot conclude, based upon the record before it, that Government Code section 12945 has only one legally tenable interpretation in this regard.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.[65]

Government Code section 11342, subdivision (b), contains the following specific exception to APA requirements:

> "'Regulation' means every rule, regulation, order, or standard of general application or . . ., except one which relates only to the 'internal management' of the state agency." [Emphasis added.]

The Department states in its response to the Request for Determination that:

> "The procedures in Directive 17 (5.(A.)-(D.)) relate solely to the management of the internal affairs of the Department. It is directed to and affects only the employees of the Department. The Directive merely addresses the efficient processing (waiver) of cases that can no longer be investigated by the Department under law. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Government Code section 11342(b).)
>
> "As long as the Department observes the laws which define and limit its jurisdiction, the Department is entitled to adopt internal procedures governing the processing and waiver of complaints as appropriate."

The "internal management" exception has been judicially determined to be narrow in scope.[66] A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" under review (1) affects only the employees of the issuing agency[67,68] and (2) does not address a matter of serious consequence involving an important public interest.[69,70]

In Poschman v. Dumke,[71] the court held that a Board of Trustees of California State Colleges rule dealing with tenure was not exempt from the APA because

> "Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community."[72] [Emphasis added.]

In Armistead v. State Personnel Board,[73] the California Supreme Court held that a State Personnel Board rule limiting the withdrawal of resignations by state employees was a "regulation" and subject to the APA. The Court rejected the State Personnel Board's argument that the rule was exempt from the APA as internal management because, the court stated,

> "[the rule] is designed for use by personnel officers . . .in the various state agencies throughout the state. . . . It concerns . . . a matter of import to all state civil service employees. . . ."[74] [Emphasis added.]

Ligon v. State Personnel Board[75] dealt with a State Personnel Board memorandum which detailed the procedures and standards by which other state agencies could consider an employee's "out of class" experience for purposes of advancement and promotion within the other agencies. The court's holding that the memorandum constituted a "regulation" was based on the implicit recognition that the challenged policy affected employees throughout the state system.

In Stoneham v. Rushen,[76] the Court held that the Department of Correction's issuance of "administrative bulletins" implementing a standardized classification and transfer system for prisoners did not constitute "internal management" because the scheme extended

> ". . . well beyond matters relating solely to the management of the internal affairs of the agency itself. Embodying as it does a rule of general application significantly affecting the male prison population in the custody of the Department, such a comprehensive classification system is not exempt as a rule of internal management from mandatory compliance with the Act [APA]."[77] [Emphasis added.]

As to the waiver provisions contained in Directive 17, the answer to the first inquiry, i.e., does the challenged rule affect only the employees of issuing agency, the answer is

"no." Although the waiver provisions in the document direct only the actions of employees of the Department, they most significantly affect those not employed by the Department. In directing its employees to waive complaints alleging pregnancy discrimination to the EEOC, these guidelines directly affect the rights of those who have filed the complaints.

The Department has asserted that ". . .the procedures in Directive 17 (5.(A.)-(D.)) relate solely to the management of internal affairs of the Department." OAL notes that it does not have sufficient information to evaluate subdivision (A) of Provision 5 and that subdivision (B), with the possible exception of subdivision (B)(3), affects only the employees of the issuing agency. However, subdivisions (C) and (D) directly affect the rights of those filing complaints alleging pregnancy discrimination. Subdivision (C) clarifies that there is to be no state involvement on complaints being waived to the EEOC and subdivision (D) specifies when complaints alleging discrimination on one or more additional basis will be waived.

With respect to the second inquiry, we find that the waiver provisions in Directive 17 address a matter of serious consequence involving an important public right. The waiver provisions directly affect the ability of those within California to protect themselves at the state level against discrimination in the workplace on the basis of pregnancy. As to Provision 5 in particular, this is certainly true of subdivisions (C) and (D). Therefore, we find that the first sentence of Provision 3, all of Provision 4, and subdivisions (C) and (D) of Provision 5 do not fall within the "internal management" exception.

III. CONCLUSION

For the reasons set forth above, OAL finds that the provisions within Directive 17 providing for the waiver of complaints against Title VII employers to the EEOC for processing (the first sentence of Provision 3, all of Provision 4, and subdivisions (C) and (D) of Provision 5) fall within the definition of a "regulation" and therefore violate Government Code section 11347.5, subdivision (a).

DATE: October 10, 1989

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1. This Request for Determination was filed by Judith Kurtz of Equal Rights Advocates, 1370 Mission Street, San Francisco, CA 94103, (415) 621-0505. The Department of Fair Employment and Housing was represented by Talmadge R. Jones, Director, 2014 T Street, Suite 210, Sacramento, CA 95814 (916) 739-4638.

   To facilitate indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination as filed with the Secretary of State is "499" rather than "1." When published in the California Regulatory Notice Register, different page numbers are assigned.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as California Administrative Code), section 121, subsection (a), provides:

   > "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, sub-

division (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Reg-

ister within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision

(c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

Comments were submitted by Mr. Osias Goren, Chair, Fair Employment and Housing Commission, dated August 10, 1989, Ms. Shannon Smith-Crowley, dated August 5, 1989, Ms. Judith E. Kurtz, Equal Rights Advocates, dated August 11, 1989, and Mr. Jon W. Davidson, American Civil Liberties Union of Southern California, dated August 14, 1989. The Department submitted a Response to the Request for Determination on August 28, 1989. The written comments and the Department's response were all considered in this determination proceeding.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

10. Stats 1959, ch. 121, sec. 1, p. 1999.

11. Former Labor Code, sec. 1411, now Gov. Code, sec. 12920.

12. Stats. 1970, ch. 1508, sec. 4, p. 2995.

13. Stats. 1980, ch. 992, sec. 4.

14. Gov. Code, sec. 12901 and 12903.

15. California Federal Savings and Loan Assn. v. Guerra (1987), 479 U.S. 272, 107 S.Ct. 683, 687, fn. 3.

16. California Federal Savings and Loan Assn. v. Guerra (1987), 479 U. S. 272, 107 S.Ct. 683, 687.

17. Gov. Code, sec. 12930(e).

18. Gov. Code, sec. 12930(f)(1).

19. Gov. Code, sec. 12935(a).

20. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

21. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in

quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

22. Stats. 1959, ch. 121, sec. 1, p. 1999.

23. Former Labor Code, sec. 1411, now Gov. Code, sec. 12920.

24. 42 U.S.C., sec. 2000(e).

25. Stats. 1970, ch. 1508, sec. 4, p. 2995.

26. 37 Federal Register 6836.

27. 29 CFR 1604.10.

28. State of California, Fair Employment Practice Commission, Guidelines: Discrimination Based on Sex, November 7, 1974.

29. (1976) 429 U.S. 125.

30. Stats. 1978, ch. 1321, sec. 1, p. 4320.

31. Pub. L. No. 95-555, sec. 1.

32. 42 U.S.C., sec. 2000e(k).

33. Stats. 1979, ch. 13, sec. 1, p. 35.

34. (1983) 462 U.S. 669, 77 L. Ed. 2d 89.

35. California Federal Savings and Loan Assn. v. Guerra (9th Cir. 1985) 758 F.2d 390.

36. OAL File No. 86-0825-2.

37. (1987) 479 U.S. 272, 107 S.Ct. 683.

38. OAL File No. 87-0211-04R.

39. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

40. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

41. Provision 1 and 2 provide:

> "1. SUBJECT: COMPLAINTS FILED ON THE BASIS OF PREGNANCY DISCRIMINATION.
>
> 2. PURPOSE: To provide procedures for handling complaints alleging discrimination on the basis of pregnancy."

These provisions are not regulatory in that they are merely introductory statements identifying the subject matter of the memorandum and describing its purpose. These provisions do not contain rules or standards of general application.

Provision 3 provides:

> "BACKGROUND: AB1960, which became effective January 1, 1979, excludes from State jurisdiction (in most cases) all employers who fall under the jurisdiction of EEOC (Title VII of the Federal Civil Rights Act of 1964). Because of this, it is necessary to provide Department staff with guidelines to clarify which charges are to be waived to EEOC and which charges can properly be processed by DFEH."

The first sentence of Provision 3 describes the effect of AB 1960 as excluding from state jurisdiction all employers that fall under the jurisdiction of the EEOC and is discussed in this Determination as a waiver provision. However, the second sentence merely explains the purpose of the guidelines which follow. The second sentence does not itself establish a standard nor interpret a statute and is not regulatory.

Provision 5, subdivisions (A) and (B), provides:

"A. Pregnancy discrimination complaints that are to be processed by DFEH are to be handled in the usual manner for DFEH complaints.

B. Pregnancy discrimination complaints that are to be processed by EEOC are to be handled as follows:

1. After the complaint is taken, EEOC form 212-A is to be completed and section marked "706 Agency Waives" is to be checked.

2. The 212-A is to be sent to EEOC with copies of the complaint, the pre-complaint questionnaire, and any interview notes.

3. A pre-closure letter, DFEH-200-09, is to be sent to the complainant.

4. The complaint is to be closed immediately on the basis of code 11, processing waived to another agency."

OAL does not have sufficient information to evaluate subdivision (A). However, subdivision (B) appears to direct the internal processing of complaints alleging pregnancy discrimination that have already been determined appropriate for waiver to the EEOC and may well come within the "internal management" exception. A discussion of this exception is contained in the body of this Determination.

42. 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.

43. Department's Response to the Request for Determination, p. 3.

44. Department's Points and Authorities in Support of Motion for Repeal of 2 Cal.Admin.Code section 7291.2, pp. 2-5.

45. Department's Points and Authorities in Support of Motion for Repeal of 2 Cal.Admin.Code Section 7291.2, pp. 5-8.

46. Department's Points and Authorities in Support of Motion for Repeal of 2 Cal.Admin.Code Section 7291.2, p. 7.

47. Department's Points and Authorities in Support of Motion for Repeal of 2 Cal.Admin.Code section 7291.2, pp. 8-11.

48. (1987) 479 U.S. 272, 291, n.30, as cited in the Department's Response to the Request for Determination, pp. 3-4.

49. (1987) 479 U.S. 272, 107 S.Ct. 683.

50. Ball v. Rodgers (1960) 187 Cal. App. 2d 442, 9 Cal. Rptr. 666.

51. Simmons v. Superior Court (1959) 52 Cal. 2d 373, 378, 341 P. 2d 13.

52. Ball v. Rodgers (1960) 187 Cal.App.2d 442, 9 Cal.Rptr. 666; Childers v. Childers (1946) 74 Cal.App.2d 56, 168 P. 2d 218.

53. (1987) 479 U.S. 272, 107 S.Ct. 683, 690.

54. 42 U.S.C., sec. 2000e-7.

55. 42 U.S.C., sec. 2000h-4.

56. City of Coronado v. San Diego Unified Port District (1964) 227 Cal.App.3d 455, 38 Cal.Rptr. 834.

57. (1987) 479 U.S. 272, 107 S.Ct. 683, 690.

58. (1987) 479 U.S. 272, 107 S.Ct. 683, 692.

59. Filed with Secretary of State 3-20-87; effective thirtieth day thereafter.

60. Letter from Osias Goren, Chair, Fair Employment and Housing Commission, to Herbert F. Bolz, Coordinating Attorney, Rulemaking and Regulatory Determinations Unit, Office of Administrative Law, dated August 10, 1989.

61. Fig Garden Park v. Local Agency Formation (1984) 162 Cal. App. 3d 336, 208 Cal. Rptr. 474, 478.

62. Letters from: Mr. Jon W. Davidson, American Civil Liberties Union of Southern California, to OAL, dated August 14, 1989; Ms. Shannon Smith-Crowley to OAL, dated August 5, 1989.

63. Letter from Mr. Jon W. Davidson, American Civil Liberties Union of Southern California, to OAL, dated August 14, 1989, pp. 2-5.

64. Sutherland Stat. Const., sec. 58.04 (4th ed.).

65. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

    f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans

Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

66. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 107 Cal.Rptr. 596; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.

67. Id., Armistead, Stoneham I, and Poschman.

68. 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.

69. See Poschman v. Dumke (1983) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603; and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4.

70. 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009) California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.

71. (1983) 31 Cal. App. 3d 932, 107 Cal. Rptr. 596.

72. Id., 31 Cal.App.at 943, 107 Cal.Rptr. at 603.

73. (1978) 22 Cal.3d 198, 149 Cal. Rptr. 1.

74. Id., 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4.

75. (1981) 123 Cal.App.3d 583, 587-588, 176 Cal.Rptr. 717, 718-719.

76. (1982) 137 Cal.App.3d at 736, 188 Cal.Rptr. at 135.

77. See also Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125, in which the Court held that Chapter 4600 of the Department of Corrections' Administrative Manual was a "regulation" and was not a rule of internal management because it "significantly affect[ed] the male prison population in the custody of the department."

78. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.